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RA GUNASEHARAN APPOO v. SHAIFULBAHARI ZAKARIA & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
DAVID WONG DAK WAH JCA
B UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: W-02-849-05-2014]
25 NOVEMBER 2015

C ***LEGAL PROFESSION:*** *Disciplinary Committee – Findings of – Client lodged complaint against solicitor for mismanagement of claim – Disciplinary Committee considered additional charges against solicitor – Whether solicitor informed about additional charges – Disciplinary Committee made findings not within terms of complaints made by complainant – Whether solicitor accorded full opportunity to defend himself – Whether solicitor denied rights to due notice of additional charges,* D *to present evidence and to cross-examination*

The first respondent appointed the appellant, an advocate and solicitor, to pursue a claim for personal injury arising from a motorcar accident. The appellant filed the claim on 4 May 2009. On 14 June 2011, the appellant informed the first respondent that he received an offer of RM20,000 from the E insurance company to settle the claim and requested for written instruction. The first respondent did not give any written instruction but on 30 June 2011, the appellant attended court and obtained a consent judgment of RM20,000 ('the judgment sum') for the first respondent. Dissatisfied with the manner in which the appellant handled his claim, the first respondent lodged F a complaint against the appellant with the Disciplinary Committee ('DC') on the grounds that (i) the case handled by the appellant took a long time; (ii) the letter sent to the first respondent was incomplete in that there was no detail as to the court case number, making it impossible for the first respondent to attend court; and (iii) the first respondent attended court on the G dates informed by the appellant but there were no hearings and the appellant could not be found. The DC found, *inter alia*, that (i) the appellant had entered a consent judgment without the consent of the first respondent; and (ii) the appellant kept the monies paid by the insurance company in his law firm without any valid excuse. The DC recommended that the appellant (i) H be ordered to pay the judgment sum to the first respondent; and (ii) be suspended from practise for a reasonable period of not less than two years. The Disciplinary Board ('DB') affirmed the findings of the DC and ordered that the appellant (i) pay a penalty of RM30,000 to the Discipline Fund and in default the appellant shall be suspended from practice as an advocate and solicitor until payment of the penalty; and (ii) procure and return the cheque I for the judgment sum to the first respondent within two months from the date of the order. Aggrieved by the said findings, the appellant appealed to the

High Court on the ground that the DC's findings were not within the terms of the complaints made by the first respondent. It was argued that the complaints of the first respondent did not contain the entering of a consent judgment without the first respondent's consent and the retention of the cheque issued by the insurance company without valid excuse. The High Court dismissed the appellant's appeal. Hence, the present appeal.

Held (allowing appeal in part)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) At no stage of the proceedings was the appellant informed by the DC that they were also considering two other charges against him. Whenever there are additional charges to be answered by the appellant, the DC must inform the appellant in clear and succinct manner of such additional charges so that he would be accorded full opportunity to defend the same. The appellant had rights to due notice of the additional charges, to present evidence to rebut and to cross-examination. (para 16)

(2) The findings on the charge of obtaining the consent judgment without the relevant consent and the withholding of the insurance payment of RM20,000 without valid reasons were set aside. The rest of the DC's findings were affirmed. The penalty imposed by the DB was amended from RM30,000 to RM15,000. (para 21)

Bahasa Malaysia *Headnotes*

Responden pertama telah melantik perayu, seorang peguam bela dan peguam cara, untuk membuat tuntutan bagi kecederaan peribadi yang dialaminya akibat kemalangan motokar. Perayu memfailkan tuntutan pada 4 Mei 2009. Pada 14 Jun 2011, perayu memaklumkan responden pertama bahawa dia menerima tawaran RM20,000 daripada syarikat insurans untuk menyelesaikan tuntutan dan memohon arahan bertulis. Responden tidak memberi apa-apa arahan bertulis tetapi pada 30 Jun 2011, perayu hadir di mahkamah dan memperoleh penghakiman persetujuan berjumlah RM20,000 ('jumlah penghakiman') bagi responden pertama. Tidak berpuas hati dengan cara perayu menguruskan tuntutannya, responden pertama membuat aduan terhadap perayu kepada Jawatankuasa Tatatertib ('JT') atas alasan bahawa (i) kes yang diuruskan oleh perayu mengambil masa yang lama; (ii) surat yang dihantar kepada responden pertama tidak lengkap kerana tiada butir-butir tentang kes mahkamah, menyukarkan responden pertama untuk hadir ke mahkamah; dan (iii) responden pertama hadir di mahkamah pada tarikh-tarikh yang dimaklumkan oleh perayu tetapi perbicaraan tidak berlangsung dan perayu tidak dapat dijumpai. Jawatankuasa Tatatertib memutuskan, antara lain, bahawa (i) perayu memasuki penghakiman persetujuan tanpa persetujuan responden pertama; dan (ii) perayu menyimpan wang yang dibayar oleh syarikat insurans dalam firma guamannya tanpa alasan sah.

Jawatankuasa Tatatertib mencadangkan agar perayu (i) diarahkan membayar jumlah penghakiman kepada responden pertama; dan (ii) digantung daripada beramal bagi tempoh munasabah yang tidak kurang dari dua tahun. Lembaga Tatatertib ('LT') mengesahkan dapatan JT dan memerintahkan agar perayu (i) membayar denda RM30,000 kepada Tabung Tatatertib dan jika ingkar, perayu digantung daripada beramal sebagai peguam bela dan peguam cara sehingga bayaran denda dibuat; dan (ii) mendapatkan dan memulangkan cek jumlah penghakiman kepada responden pertama dalam tempoh dua bulan dari tarikh perintah. Terkilan dengan dapatan tersebut, perayu merayu ke Mahkamah Tinggi atas alasan bahawa dapatan JT tidak termasuk dalam aduan yang dibuat oleh responden pertama. Dihujahkan bahawa aduan oleh responden pertama tidak mengandungi kemasukan penghakiman persetujuan tanpa kebenaran responden pertama dan penahanan cek yang dikeluarkan oleh syarikat insurans tanpa alasan sah. Mahkamah Tinggi menolak rayuan perayu. Oleh itu, rayuan ini.

Diputuskan (membenarkan sebahagian rayuan)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Tidak ada mana-mana dalam peringkat prosiding yang menunjukkan perayu dimaklumkan oleh JT bahawa mereka mempertimbangkan dua lagi pertuduhan terhadapnya. Apabila terdapat pertuduhan tambahan untuk dijawab oleh perayu, JT mesti memaklumkan perayu dengan cara yang jelas dan ringkas tentang pertuduhan tambahan supaya dia diberi peluang penuh untuk mengemukakan pembelaan. Perayu mempunyai hak-hak untuk mendapat notis tentang pertuduhan tambahan, mengemukakan keterangan untuk menyangkal dan menyoal balas.

(2) Dapatan tentang pertuduhan memperoleh penghakiman persetujuan tanpa kebenaran relevan dan menyekat bayaran insurans sebanyak RM20,000 tanpa alasan sah diketepikan. Dapatan-dapatan lain oleh JT disahkan. Denda yang dikenakan oleh LT dipinda daripada RM30,000 kepada RM15,000.

Case(s) referred to:
B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 1 LNS 14 PC ***(refd)***
Batu Malay Thandy v. Saulinardi & Anor [2015] 1 CLJ 33 CA ***(refd)***
Ding Siew Ching v. Ling Peek Hoe [2014] 8 CLJ 15 CA ***(refd)***
Keith Sellar v. Lee Kwang And Tennakoon v. Lee Kwang [1980] 1 LNS 36 FC ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 100(1)(b), 103(1), 103D(2), (4), (5)

For the appellant - Roslinda Yahya (Nurul Azua Abu Yazid with her); M/s Gunaseharan & Linda
For the respondents - Wong Leong Hong; M/s The Law Office of LH Wong

[Editor's note: For the High Court judgment, please see RA Gunaseharan Appoo v.

Shaifulbahari Zakaria; Majlis Peguam Malaysia (Intervener) [2014] 1 LNS 915 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal by the appellant against the learned judge's refusal to disturb the decision of the Advocates and Solicitors Disciplinary Board dated 16 February 2013 which affirmed the findings of the Disciplinary Committee.

[2] We heard the appeal and after considering respective submissions from respective counsel allowed the same in part. We now give our reasons.

Background Facts

[3] The appellant is a member of the legal profession. The first respondent by the name of Shaifulbahari bin Zakaria lodged a complaint against the appellant with the Disciplinary Committee on 18 March 2011. The complaints as set out by the learned judge were these:

(i) the case handled by the appellant took a long time, in fact some seven years;

(ii) the letter sent to the first respondent was incomplete in that there was no details as to the court case number making it not possible for him to attend court; and

(iii) the first respondent complainant had attended court on the dates informed by the appellant except when he was indisposed. However when he had attended court, there was no hearing and the appellant could not be found.

[4] The aforesaid complaints stemmed from the following factual matrix. The first respondent was involved in a motorcar accident sometime in July 2004 and the appellant was appointed by the first respondent to pursue his claim for his personal injury arising from the aforesaid accident. The appellant filed the appropriate legal action at the Shah Alam Sessions Court on 4 May 2009 under Summons No. 53-338-2009. In view of the manner in which the appellant handled his claim, the first respondent lodged the above complaints.

[5] The Disciplinary Committee pursuant to s. 100(1)(b) of the Legal Profession Act 1976 (LPA) and the complaint by the first respondent issued a letter dated 6 May 2011 to the appellant for an explanation and gave the same 14 days to reply. The appellant only replied the Disciplinary Committee *via* a letter dated 14 November 2011.

[6] On 14 June 2011, the appellant wrote to the first respondent to inform that he had received an offer of RM20,000 from the insurance company to settle the claim and requested for written instruction. The first respondent did not give any written instruction but the appellant in any event on 30 June 2011, attended court and obtained a consent judgment of RM20,000 for the first respondent.

[7] Hearings before the Disciplinary Committee were conducted on 29 March 2012, 18 April 2012 and 16 May 2012. The Disciplinary Committee after due deliberation made the following findings:

(i) though there was a delay in filing the summons (five years from the date of the accident), the delay *per se* did not breach the relevant rules of the Legal Profession (Practice and Etiquette) Rules 1978;

(ii) the appellant had entered a consent judgment without the consent of the first respondent;

(iii) the appellant had kept the monies paid by the insurance company in his law firm without any valid excuse; and

(iv) the letters sent by the appellant to the first respondent regrettably did not contain any details of the summons and case number on the same. The first respondent had twice travelled from Johor to Shah Alam to attend court but was not able to attend court as he had no details as to the number of the case. Further, when the first respondent went to the appellant's office to obtain details of the case, he was not given the same. These visits had caused hardship to the first respondent and his family as he had to expend time and money.

[8] The Disciplinary Committee recommended that the appellant be ordered to forthwith pay to the first respondent the sums of RM22,000 (RM20,000 being judgment sum and RM2,000 being agreed costs) with interest from the date the sum was received until payment to the first respondent and that the appellant be suspended from practising for a reasonable period of not less than two years.

[9] The Disciplinary Board on 16 February 2013 affirmed the findings of the Disciplinary Committee and pursuant to s. 103D(2), s. 103D(4) and s. 103D(5) of the LPA made the following orders:

(i) that the appellant pay a penalty of RM30,000 to the discipline fund within one month from the date of the order and in default the appellant shall be suspended pursuant to s. 103(1) of the LPA from practice as an advocate and solicitor until payment of the penalty; and

(ii) that the appellant do procure and return the cheque for the sum of RM20,000 to the first respondent within two months from the date of the order.

High Court Proceedings And Decision

[10] The appellant in his appeal before the High Court had complained that the Disciplinary Committee had made findings which were not within the terms of the complaints made by the first respondent.

[11] To recapitulate, it was undisputed that the complaints of the first respondent did not contain the entering of a consent judgment without the first respondent's consent and the retention of the cheque issued by the insurance company without valid excuse.

[12] The learned judge rejected the appellant's contention relying on the judgment of this court in *Ding Siew Ching v. Ling Peek Hoe* [2014] 8 CLJ 156; [2013] MLJU 1182 where it held that the Disciplinary Committee can make findings on subsidiary findings:

> [10] Three main issues were raised before us. It was first argued that in cases of disciplinary action against a lawyer, of prime importance is the complaint made. According to the Appellant the complaint against her is confined to allegations of fraudulent misrepresentation and fraud. In this regard, the Appellant contends that since the Disciplinary Committee had come to a finding that the allegations against her must be dismissed as the allegations had not been proved to the standard required i.e. beyond reasonable doubt, it was wrong for the Disciplinary Committee to go on to find that "there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency" in what the Appellant had done in respect of the transaction complained of. It is the Appellant's case that in coming to its latter findings, the Disciplinary Committee had clearly exceeded the parameters of the complaint against the Appellant. The Appellant also contends that the decision of the Disciplinary Committee is riddled with inconsistencies, in that, after having dismissed the complaint, the Disciplinary Committee went on to eventually conclude that there is sufficient merit in the complaint and recommend the Appellant be suspended from practice for 18 months.
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> [11] We do not agree with the Appellant's contentions. Although the main thrust of the complaint against the Appellant was of fraudulent misrepresentation or that she had allowed herself to be used as an instrument of fraud, the complaint arose in the context of a land transaction involving the Appellant's own brothers where the complaint included an allegation that the Complainant had trusted the Appellant as a lawyer. Even though the letter of complaint was drafted in layman's terms it is our view that an allegation that trust had been reposed by the Complainant in the Appellant as the lawyer handling the transaction must necessarily include an expectation that the appellant would look after his best interests in the transaction.
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> [12] We have in an earlier part of this judgment set out some of the findings of fact made by the Disciplinary Committee which clearly indicate that the Appellant, as the lawyer involved in the transaction, had put

herself in a position of conflict of interest but had failed or taken no positive steps to avert the consequences of such conflict. There were also findings of fact made by the Disciplinary Committee that the Appellant had acted for the Complainant without the latter's authority in writing or knowledge; that the Appellant knew that the deposits and balance of purchase prices were in fact not paid to the Complainant but utilised to contra or settle money lending transactions, but yet she made the complainant signed her general vouchers for the balance of the purchase price even though the sums were not released through her office to the Complainant; that the Appellant admitted to amending a voucher with "liquid paper" so that the date and the amount appearing therein will tally with the purchase consideration.

[13] We therefore find that the Disciplinary Committee's findings that "there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency", were findings in respect of matters which were well within the scope of the complaint being investigated into by the Disciplinary Committee. Further, the complaint, not being limited to the question of fraud alone, we find no substance to the contention that the main findings of the Disciplinary Committee are inconsistent with its subsidiary findings.

[13] We had no issue with the aforesaid approach of this court. But we hastened to add that each case must be considered on its peculiar circumstances.

[14] Before we deal with the factual matrix in this case, it should be noted by all that any complaint against a lawyer to the Disciplinary Committee is a serious matter. Its seriousness is reflected by the requirement by law that any complaint made must be proved beyond reasonable doubt by the complainant against the lawyer (see *Keith Sellar v. Lee Kwang* And *Tennakoon v. Lee Kwang* [1980] 1 LNS 36; [1980] 2 MLJ 191 (Federal Court). That standard of proof is of course similar to that of a criminal charge.

[15] The ramification of such complaint should also not be underestimated in that the lawyer concerned may be suspended or struck off from the practice roll, hence depriving him or her right of livelihood. His or her reputation would also be adversely affected by any unfavourable findings of the Disciplinary Committee. Hence we were of the considered view that the rule of "natural justice" must be strictly complied with despite the fact that the proceedings before the Disciplinary Committee is akin to a tribunal rather than a court of law. That said we were also fully aware that the public must be protected from practising lawyers who breach ethical rules prescribed by the legal profession.

[16] We had read the notes of proceedings of the Disciplinary Committee and we found that at no stage of the proceedings was the appellant informed by the Disciplinary Committee that they were also considering two other

charges as mentioned above against him. It was our considered view that whenever there are additional charges to be answered by the appellant, the Disciplinary Committee must inform the appellant in clear and succinct manner of such additional charges so that he would be accorded full opportunity to defend the same. Our view was consistent with the appellant's right to due notice of the additional charges, right to present evidence to rebut and right to cross-examination. All these rights are embodied in the concept of natural justice (see *Batu Malay Thandy v. Saulinardi & Anor* [2015] 1 CLJ 33).

[17] From the notes of proceedings, we can only find the following interchange between the appellant and the first respondent/complainant at p. 449 appeal records volume 2(3):

Responden :	Ada Anuar datang 20.6.2011 ke 30.6.2011 minta encik datang Mahkamah?
Pengadu :	Tak saya tinggal tempat lain, ibu-bapa masa itu tak tahu, tak pasti maklum kepada ibu-bapa atau tidak.
Responden :	Ada diberitahu tawaran RM20,000.00
Pengadu :	Tak ingat
Responden :	Ada orang marah Anuar
Pengadu :	Tak tahu orang marah Anuar

[18] How that interchange could lead to the conclusion that the appellant had obtained the consent judgment without the first respondent's consent was, with respect, beyond us. It was not disputed that the first respondent did not attend the final day of the Disciplinary Committee hearing on the third day. In our view, it was no answer to say that the appellant was given a chance to answer and did answer the two charges by way of submissions for the simple reason that the appellant was not given full opportunity by way of cross-examination to extract all the facts from the first respondent. We were also aware that the Disciplinary Committee had considered the warrant to act in coming to its decision. That, with respect, was only one piece of evidence. We cannot speculate what would have happened in terms of additional evidence if the appellant was informed of the two charges in clear and succinct manner and given a chance to cross-examine the first respondent on these two additional charges. But the reality was that he was not so informed which, with respect, had contravened the rules of natural justice.

Conclusion

[19] We were fully aware of the fact that the Disciplinary Committee was not acting as a court of law and there are judicial pronouncements to the effect that the court should be slow in interfering the manner in which a

A tribunal conducts its hearings. Be that as it may, as stated earlier by us, disciplinary action against lawyers is a serious matter and any breach of the rules of natural justice cannot be condoned.

[20] We can do no better than to refer to what Lord Denning said of the "right to be heard" in *B Surinder Singh Kanda v. The Government of the* B *Federation of Malaya* [1962] 1 LNS 14; [1962] 1 MLJ 169:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and he must be given a fair C opportunity to be correct and contradict them

[21] Accordingly we allowed the appeal in part in that the findings on the charge of obtaining the consent judgment without the relevant consent and the withholding of the insurance payment of RM20,000 without valid reasons be set aside. The rest of the Disciplinary Committee's findings were D affirmed. We also amended the penalty imposed by the Disciplinary Board from RM30,000 to RM15,000. We made no order as to costs. We also ordered that the deposit to be refunded to the appellant.

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